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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-26
Table of Allotments,)	RM-8968
FM Broadcast Stations.)	RM-9089
(Detroit, Howe and Jacksboro, Texas,)	RM-9090
Antlers and Hugo, Oklahoma))	
)	
In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-91
Table of Allotments,)	RM-8854
FM Broadcast Stations.)	RM-9221
(Lewisville, Gainesville, Robinson,)	
Corsicana, Jacksboro, and Mineral)	
Wells, Texas))	

To: Allocations Branch
Policy and Rules Division
Mass Media Bureau

Reply to Snyder's Opposition to Petition for Partial Reconsideration

Heftel Broadcasting Corporation ("Heftel"), by its counsel, hereby submits this Reply to the Opposition to Petition for Partial Reconsideration ("Opposition") filed by Snyder and Associates, Inc. ("Snyder") on October 5, 1998.^{1/}

^{1/} On October 9, 1998, Heftel filed a "Request To Refer Petition for Partial Reconsideration to the Commission" with the Allocations Branch. In it, Heftel noted that Snyder and Metro Broadcasters-Texas, Inc. had filed Applications for Review of the Branch's Report and Order DA 98-1650 (released August 21, 1998) ("Report and Order") which was the subject of its Petition for Partial Reconsideration, and requested that the Branch refer that Petition and all associated pleadings to the full Commission for consideration. If the Branch takes the action requested by Heftel, it should also refer this pleading to the Commission.

Heftel's Petition for Partial Reconsideration, filed September 21, 1998, urged the Allocations Branch (hereafter "Branch") to compare the merits of the proposal to amend the FM Table of Allotments (Section 73.202(b) of the rules) advanced by Heftel in its Petition for Rule Making filed July 26, 1996 ("Initial Petition") with the proposal of Snyder (and, if its proposal qualifies for consideration in this proceeding, Metro Broadcasters-Texas, Inc.)^{2/}. After the Branch makes this evaluation based on established precedent^{3/}, Heftel urged the Branch to grant Heftel's Initial Petition.

Snyder makes no effort in its Opposition to contend that its proposal would provide superior service to the public than would the proposal advanced in Heftel's Petition. Rather, it contends that Heftel's Petition for Partial Reconsideration is "nothing more than an attempt to moot many of the procedural issues that Heftel had to know Snyder and Metro would raise in an application for review" (Opposition, page 3) and "an attempt to use the provisions of Section 1.104(c) of the FCC's rules to cover up numerous procedural errors in this proceeding before they are considered in the Applications for Review." Opposition, page 4. Furthermore, Snyder opposes Heftel's Petition for Partial Reconsideration on the grounds that (1) Heftel has agreed to the continuance of Channel 240C1 at Mineral Wells by virtue of the fact that it entered into an agreement with Snyder that would, if approved by the Commission, have left Channel 240C1 at Mineral Wells (Opposition, page 2); (2) Heftel's Initial Petition should have been dismissed by the Commission's staff because it did not protect the special reference point for Station KYXS-FM at Mineral Wells, Texas (i.e., NL 32-41-06; WL 98-09-32) established by the Branch in Mineral Wells and Winters, Texas, 7 FCC Rcd

^{2/} However, see Paragraph 6 of the Report and Order wherein the Branch concluded that Metro's counterproposal was invalid because it did not include a timely-submitted reimbursement commitment.

^{3/} Revision of FM Assignment Policies and Procedures, 90 FCC 2d 188 (1982), recon. denied, 56 RR 2d 448 (1984).

1791 (1992) (“Mineral Wells proceeding”)^{4/} (Opposition, page 3); and (3) that Heftel’s Initial Petition is fatally flawed because it did not expressly request a change in the current Mineral Wells reference point. Opposition, page 3.

I. Heftel’s Petition for Partial Reconsideration Does Not Foreclose Consideration of the Issues Advanced by Snyder.

Snyder’s assertion that Heftel’s Petition for Partial Reconsideration represents an effort by Heftel to “moot” and to “cover up” procedural issues Heftel “had to know” that Snyder and Metro would raise on appeal is perfectly absurd. To state the obvious, Heftel was not required to address the procedural concerns of its adversaries in its Petition for Partial Reconsideration. In any event, Heftel was well aware that Snyder and Metro would have the opportunity (under Section 1.106(g) of the Commission’s rules) to raise various procedural issues in the context of their Oppositions to Heftel’s Petition for Partial Reconsideration. Finally, as noted above, Heftel has filed a request with the Branch in which it asks that the Branch refer its Petition for Partial Reconsideration and all related pleadings to the full Commission for review in an effort to speed the resolution of this proceeding and to conserve administrative resources. That remains Heftel’s position, and it trusts that Snyder will not oppose Heftel’s efforts to speed resolution of this proceeding and all relevant issues.^{5/}

^{4/} In a Public Notice released January 28, 1998 (Report No.2251), the Mass Media Bureau stated that Snyder’s upgrade application would be considered as a counterproposal in this proceeding, and in the Branch’s Report and Order now under review, the Branch compared the public interest benefits of the proposal in Heftel’s Petition with the benefits of Metro’s proposal (see Paragraph 7).

^{5/} Heftel addressed the issues raised by Snyder (and Metro) in their respective Applications for Review in the Consolidated Opposition which it filed with the full Commission on October 9, 1998. Therefore, Heftel declines to respond in this pleading to the other issues raised by Snyder in its Application for Review.

II. Heftel Is Not Required to Support the Retention of Channel 240C1 at Mineral Wells by Virtue of its Now Defunct Agreement with Snyder.

Snyder's argument that Heftel has consented to the retention of Channel 240C1 at Mineral Wells by virtue of its agreement with Snyder is ridiculous. Heftel agreed to withdraw its proposal to downgrade Channel 240C1 at Mineral Wells only if the agreement was approved by the Commission (it was not^{6/}) and only if Snyder filed an amendment to its pending KYXS-FM Channel 240C1 upgrade application (BPH-961125IG) to a new site which would accommodate all the other aspects of Heftel's proposal. Snyder expressly acknowledges that its agreement with Heftel is "dead as a doornail" (Snyder Application for Review, page 5), and presumably Snyder has no intention of filing the amendment it promised to file which would allow the implementation of Heftel's proposal. Since the essential preconditions to Heftel's agreement to support the retention of Channel 240C1 at Mineral Wells are no longer viable, Heftel has no responsibility to support the retention of Channel 240C1 at Mineral Wells because, in its view, that assignment is vastly inferior to its proposal in terms of service to the public.^{7/}

III. Heftel's Initial Petition Was Not Barred by Section 73.207(a) of the Commission's Rules.

Snyder's Opposition contends that Heftel's Initial Petition should have been rejected because Section 73.207(a) of the Commission's rules requires rulemaking petitions to be properly spaced vis-a-vis all current reference points. Opposition, page 3. That rule is inapplicable in the current situation because the reference point for Mineral Wells was designated in the Mineral Wells

^{6/} See Report and Order, Paragraph 13.

^{7/} In this context, Heftel can not refrain from remarking that Snyder does not even contend that its proposal would provide superior service to the public than would Heftel's proposal. Its position is clearly and exclusively based an effort to vindicate its private interests, and without regard to the public interest.

proceeding in the context of the substitution of Channel 240C1 for Channel 240C3; therefore, the two changes are inseparably linked. A request to change the allotment from Channel 240C1 to Channel 240C3 must, of necessity, contemplate a change in the designated reference point. The Commission routinely accepts FM petitions for rulemaking which propose the deletion of an FM allotment and its corresponding reference point. The same result must obtain in this situation (with the exception, however, that Heftel seeks merely to change, and not to delete, the Mineral Wells reference point). If the Commission were to adopt Snyder's interpretation of Section 73.207(a) and refused to consider any proposal to modify the Mineral Wells reference point, it would afford protection for Channel 240C1 in perpetuity, regardless of the potential public interest benefits of the proposal. Such an approach would not only be nonsensical, it would present the clearest possible conflict with Section 307(b) of the Communications Act, as amended (47 U.S.C. Section 307(b)).

IV. Heftel's Initial Petition Was Not Required To Request a Change the Mineral Wells Reference Point but Did Include the Request.

Notwithstanding its basic position that Heftel's Initial Petition was fatally defective from the outset because it did not protect the Mineral Wells reference point (Opposition, page 3), Snyder also asserts that Heftel's Initial Petition was flawed because it did not expressly request that the Commission change the designated reference point for Station KYXS-FM from the coordinates specified in the Mineral Wells proceeding to the co-ordinates of Snyder's current transmitter/tower site. Opposition, page 3.^{8/} Heftel's asserted failure to ask the Commission to perform the essentially ministerial act of changing the Mineral Wells reference point is of great moment to Snyder because

^{8/} Snyder writes: "For example, in Heftel's Petition for Rulemaking, Heftel never requested that the reference point for the C1 allotment to Mineral Wells be changed from that specified in the FCC's rules (footnote omitted) of N.L. 32-41-06; W.L. 98-09-32 to the present site of Snyder's station KYXS(FM), as Heftel now does at p.9, n.7 of the Petition."

it apparently believes that Heftel's failure to include that request (i.e., to change in the Mineral Wells reference point) in its Initial Petition constitutes a fatal flaw which requires that Heftel's Initial Petition be dismissed.^{2/} Opposition, page 3.

Snyder's position is wrong for two reasons. First, Heftel did not need to expressly request that the reference point for Channel 240C1 be changed to the current reference point for Station KYXS-FM (and Snyder cites no authority to the contrary). The current Mineral Wells reference point was established in the Mineral Wells proceeding when the allotment was changed from Channel 240C3 to Channel 240C1, and therefore the Channel 240C1 allotment and the specially-designated reference point were interlocked. Heftel's request to return to the original Mineral Wells allotment (Channel 240C3), if approved by the Commission, would necessarily require a return of the Mineral Wells reference point to the transmitter/tower site of Snyder's operating Station KYXS-FM. According, there was no requirement that Heftel make a specific request in its Initial Petition (or elsewhere) to change the Mineral Wells reference point (separate and apart from the request which was inherent in the request to change the Mineral Wells allotment from Channel 240C1 to Channel 240C3.)

In any event, it is clear from a close reading of Heftel's Initial Petition that Heftel did, indeed, request a change in the Mineral Wells reference point, Snyder's protestations to contrary notwithstanding. The engineering study supplied with Heftel's Initial Petition indicated not only that the allocation of Channel 237A (in place of Channel 299A) at Jacksboro, Texas, was

^{2/} The issue of the Mineral Wells reference point is, however, important to the satisfactory resolution of this proceeding. Assuming that the Commission ultimately decides to approve the amendment of the FM Table of Allotments (Section 73.202(b) of the rules) in the manner proposed by Heftel, the Commission must also change the Mineral Wells reference point to the co-ordinates of Snyder's transmitter/tower. If no change is made in the current reference point, it will be impossible for station KJKB at Jacksboro to change from Channel 299A to Channel 237A as proposed by Heftel and as contemplated by the Report and Order, thereby blocking the allotments/substitutions at Gainesville/Lewisville and Corsicana/Robinson which are the basis of Heftel's Initial Petition.

incompatible with the Channel 240C1 allocation for Station KYXS-FM at the currently-designated reference point, but also expressly noted that the allocation of Channel 237A at Jacksboro was fully-spaced with the Channel 240C3 allocation for Station KYXS-FM at the station's current site. The Technical Statement of James Sorensen, included as Exhibit No. 1 to the Initial Petition stated the following (unnumbered page 4, emphasis supplied):

Returning the Channel 240 allocation at Mineral Wells to Class C3 will not conflict with the current operations of Station KYXS-FM and will permit the allocation of Channel 237A at the Jacksboro city reference point. Figure E-7 shows that the Mineral Wells allotment as a Class C3 will clear the Channel 237A proposal at Jacksboro.

Indeed, Figure E-7(copy attached) shows that the proposed allotment of Channel 237A at the Jacksboro reference point is properly spaced by 3.9 kilometers to the reference point of the Channel 240C3 "LIC" site for Station KYXS-FM.

In other words, it was inherent in the technical integrity of Heftel's Initial Petition that Heftel not only request a change in the allocation of the Mineral Wells allotment from Channel 240C1 to Channel 240C3, but that it also request a change in the Mineral Wells reference point to the current transmitter/tower location of Snyder's Station KYXS-FM.^{10/} The text of Heftel's Initial Petition confirms this concept. Heftel wrote as follows (pages 8-9, emphasis supplied):

However, in order to allot Channel 237A at Jacksboro, Texas, it will be necessary to return the vacant Channel 240C1 allocation at Mineral Wells, Texas, to Channel 240C3. These are the current operating facilities of the licensee of Station KYXS-FM, Mineral Wells and were the allocated facilities until that licensee sought the upgrade to Class C1.

While the foregoing passage does not include the words "and change the Mineral Wells reference point to the one currently utilized by Station KYXS-FM," no reader could possibly fail to understand that this was obviously and exactly what Heftel was requesting. The contemplation of

^{10/} Of course, Heftel could not have proposed to change the Mineral Wells reference point to any location other than the transmitter/tower location of Snyder's Station KYXS-FM without Snyder's approval (which had not been given.)

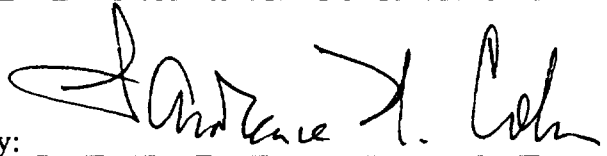
a "return" of the Mineral Wells allotment to the "current operating facilities of the licensee of Station KYXS-FM" can have no meaning other than that Heftel intended both to reestablish the former Channel 240C3 allotment at Mineral Wells, and also to modify the reference point for Station KYXS-FM to the one which was in place prior to the upgrade to Channel 240C1--i.e., the one currently in use. In the face of the foregoing, Snyder has no legitimate argument that Heftel's Initial Petition "never requested" that the Commission change the Mineral Wells reference point to its current transmitter/tower site assuming, arguendo, that it was required to do so. Snyder's argument to the contrary represents linguistic nit-picking which is significant of absolutely nothing.

Conclusion

In sum, the issues raised by Snyder in its Opposition are without merit. If the Branch declines Heftel's request to refer its Petition for Partial Reconsideration to the full Commission, it should grant the relief requested therein.

Respectfully submitted

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Date: October 15, 1998

FM CHANNEL SPACING STUDY

Job title: JACKSBORO CITY REFERENCE

Latitude: 33 13 23

Channel: 237A

Longitude: 98 9 14

Database file name: D:\FCCDATA\FM960613.EDX

Pre-1989 Class A spacings?: N
Reqd.

CH	Call	Record	City	ST	Status	Bear.	Dist.	Dist.	Result
235C	KEWS	14777	Arlington	TX	LIC	122.2	131.2	95.0	36.2
237C3	KHYI	14814	Howe	TX	LIC	82.0	146.1	142.0	4.1
238C	KCKR	15374	Waco	TX	LIC	160.0	224.2	165.0	59.2
239C1	KKAJFM	15457	Ardmore	OK	LIC	42.5	132.5	75.0	57.5
240C1		15918	Mineral Wells	TX	VACANT	180.4	59.7	75.0	-15.3
240C3	KYXSFM	15919	Mineral Wells	TX	LIC	174.1	45.9	42.0	3.9
236A	KVMX	15930	Eastland	TX	ADD	217.8	104.8	72.0	32.8
237C3		15970	Lawton	OK	VACANT	350.4	143.7	142.0	1.7
237C3	KMGZ	15985	Lawton	OK	APP	349.0	153.0	142.0	11.0
237A	KMGZ	15996	Lawton	OK	CP	349.0	153.0	115.0	38.0
235C2	NEW	15998	Electra	TX	CP	321.2	123.1	55.0	68.1
238C1	KVRPFM	16338	Haskell	TX	LIC	267.9	155.1	133.0	22.1

***** End of channel 237 study *****

CERTIFICATE OF SERVICE

I, Cecy Ivie, an Administrative Assistant in the law firm of Cohn and Marks, hereby certify that on the 15th day of October, 1998, copies of the foregoing "Reply to Snyder's Opposition to Petition for Partial Reconsideration" were mailed first-class, postage prepaid, to the following:

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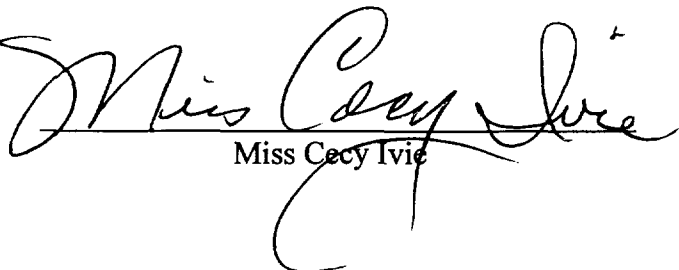
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